No. 90-1827

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

BOBBY D. PULLEY - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

I. Whether the trial court committed reversible error when it allowed a government agent to testify about an alleged statement made by a young boy which linked the petitioner to cocaine and which statement was thereafter embellished upon by the prosecutor in his closing argument to the jury resulting in extreme prejudice to the petitioner?

TABLE OF CONTENTS

PAGE

Question Presented For Review i

I. Whether the trial court committed reversible error when it allowed a government agent to testify about an alleged statement made by a young boy which linked the petitioner to cocaine and which statement was thereafter embellished upon by the prosecutor in his closing argument to the jury resulting in extreme prejudice to the petitioner? i

Table of Contents ii

Tabel of Authorities iii

Opinion Delivered in the Court Below 1

Jurisdictional Statement 1– 2

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 2– 7

Reasons for Granting the Writ 7–15

Conclusion 15

Appendix A: Opinion of Court of Appeals for the Sixth Circuit 1a–14a

Appendix B: Order of the Court of Appeals for the Sixth Circuit of Petitioner's Rehearing En Banc.. 15a

Appendix C: Judgment Issued 16a

TABLE OF AUTHORITIES

Cases: PAGE

Harris v. *Wainwright*, 760 F.2d 1148 (11th Cir. 1985) 8

Mutual Life Ins. Co. v. *Hillmon*, 145 U.S. 285 (1892) 11

Ohio v. *Roberts*, 448 U.S. 56 (1980) 11

United States v. *Freeman*, 816 F.2d 558 (10th Cir. 1987) 8

United States v. *Gomez*, 529 F.2d 412 (5th Cir. 1976) 8

United States v. *Hernandez*, 750 F.2d 1256 (5th Cir. 1985) 8, 13

United States v. *LeMere*, 22 M.J. 61 (C.M.A. 1986). 8

United States v. *Love*, 767 F.2d 1052 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986) 8

United States v. *Martin*, 897 F.2d 1368 (6th Cir. 1990) 8

United States v. *Pulley*, 922 F.2d 1283 (6th Cir. 1991) 11

United States v. *Rodriguez*, 524 F.2d 485 (5th Cir. 1975), cert. denied, 424 U.S. 972 (1976) 8, 12

United States Constitution and Statutes:

Fifth Amendment 2

Sixth Amendment 2

28 U.S.C. §1254 1

Other Authorities:

Federal Rule of Evidence 801 10

Federal Rule of Evidence 803 11

Notes of Committee on the Judiciary, House Report No. 93-650 11

No. _____

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October Term, 1990

BOBBY D. PULLEY - - - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is published in *United States* v. *Pulley*, 922 F.2d 1283 (6th Cir. 1991), and is attached hereto as Appendix A(A-1). The order of the Sixth Circuit on the Petition for Rehearing En Banc has not been published in official reports. A copy of the Order is attached hereto as Appendix B(B-1).

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1), to review by writ of certiorari the judgment affirming petitioner's conviction entered on January 10, 1991, by the United States Court of Appeals of the

Sixth Circuit. The Sixth Circuit Court of Appeals denied a Petition for Rehearing En Banc on March 25, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, which provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

STATEMENT OF THE CASE

A. Proceedings Below.

The petitioner, Bobby Douglas Pulley, was initially the subject of a nine count indictment filed in the Western District of Kentucky on January 4, 1989.[1] The original indictment charged the petitioner with six offenses consisting of two counts of possession with intent to distribute cocaine and distribution of cocaine; two counts of possession with intent to distribute cocaine; a single count of conspiring with Johnny Humphreys, Joey Holleman, and others, to possess with intent to distribute cocaine and one

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[1]Petitioner was initially indicted with two co-defendants, Johnny Humphreys and Joey Holleman. Humphreys and Holleman were indicted for various narcotic and firearm offenses. Holleman pled guilty pursuant to a plea bargain. The petitioner was tried with Humphreys at both his trial and retrial.

count of possession of a firearm in relation to a drug trafficking offense.

After petitioner's first trial ended in a mistrial, his re-trial commenced on October 10, 1989. On October 20, 1989, the petitioner was convicted of two counts of possession with intent to distribute cocaine, one count of possession with intent to distribute cocaine and distribution of cocaine, and one count of conspiring with others to distribute and possess with intent to distribute cocaine.[2]

On January 18, 1990, the District Court of the Western District of Kentucky departed upwards from the sentencing guidelines and petitioner was sentenced to 120 months on each count to run concurrently followed by a period of three years supervised release. The petitioner was also fined $100,000.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit. On January 10, 1991, the Sixth Circuit affirmed petitioner's conviction. On March 25, 1991, the Sixth Circuit denied a Petition for Rehearing En Banc.

B. Statement of Relevant Facts.

At the time of his second trial in October, 1989, the petitioner was 33 years old. He and his brother, J.C. Pulley, owned and operated Pulley's Used Cars located in Bowling Green, Kentucky. The petitioner, his wife and four children lived in a house located over a mile from the car lot.

At the time alleged in the indictment, the petitioner owned a one-half interest in the car lot and the adjoining

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[2]The second superseding indictment contained sixteen counts and the petitioner was charged in six counts realleging the six counts as set forth in the original indictment.

house. Petitioner's mother owned the other one-half interest in the property and she lived in the house. Mrs. Pulley's bedroom was located on the first floor of the house. J. C. Pulley resided in the house when he was in town. His bedroom was also on the first floor.

In October of 1988, the Bowling Green Drug Organized Crime Task Force started is investigation of Joey Holleman, a suspected cocaine dealer. A government informant made a series of purchases of cocaine from Holleman. This investigation led the task force to believe that Holleman was being supplied with cocaine from Johnny Humphreys. Surveillance of Holleman and Humphreys included occasional observations of Humphreys at Pulley's Used Cars lot. This led the government to suspect that the petitioner was supplying Humphreys with cocaine.

On December 9, 1988, search warrants were issued for Pulley's Used Car lot and Humphreys' residence. On December 9, 1988, the task force gave their informant $1,600 in marked bills with which to purchase an ounce of cocaine from Holleman.

Special Agent Donald Obermiller of the U.S. Customs Service testified that he followed Humphreys into the car lot. After the petitioner was summoned from the house, Humphreys and the petitioner went into the office for a minute or so. After Humphreys left the office, Humphreys got back into his truck, took a bag out of his pocket and attempted to put it between the seats of his truck. Humphreys was stopped and arrested. The cocaine was found between the seats.

The petitioner was then arrested and $1,500.00 in marked money was found in his pockets along with additional money. The $1,500.00 was part of the $1,600.00

in marked money that had been given to the informant earlier that day.

The car lot and the house were secured. The lot and office were searched. A drug dog assisted in the search for approximately one hour but no cocaine was found on the premises.

After the car lot was searched, the petitioner and his mother consented to allowing the police to search the house. The ground floor of the house was searched but no cocaine was found. Large sums of money which belonged to both the petitioner and J.C. Pulley were found on the ground floor of the house.[3]

The drug dog and his handler thoroughly searched the two rooms on the second floor of the house, but they were unable to find any cocaine. No one was allowed upstairs except police officers. No one lived on the second floor of the house including the bedroom where the cocaine was eventually found. The defense presented evidence that the petitioner had not gone upstairs.

Agent Obermiller testified over defense objection that two events made him suspicious that cocaine was in the house. First, he stated he overheard a little boy he thought was the petitioner's nephew talking to a state police officer. According to Obermiller, the little boy said "they were eating their lunch and . . . there was a phone call that Bobby Pulley had received after which he said Bobby had gone into the back area of the house, but that he came out a short time later and went to the office and then he came back

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[3]Although J.C. Pulley was arrested on the day of the search, he was not indicted and the case was not presented to the grand jury.

into the house and sat down to eat."[4] [Donnie Obermiller at TR. 389-92.] Second, Obermiller thought it was suspicious that two of the petitioner's brothers wanted to wash their hands in the restroom, one right after the other about 30 or 40 minutes after eating.

Obermiller testified that after he went upstairs, he searched the bedroom on the right first. He did not find any cocaine in that room. Obermiller then went into the other bedroom and searched it. He testified that he saw an open paper bag on top of the desk in the bedroom and it contained plastic bags which he suspected contained cocaine. Obermiller summoned other agents to come upstairs. The cocaine was allegedly found out in the open after officers had previously searched for a total of about three hours.

The brown paper bag and plastic baggies contained 132 grams of cocaine. The bags were fingerprinted. The only identifiable fingerprints on the bags were of another agent's thumb prints.[5]

At trial there was no direct testimony presented that Humphreys was getting his cocaine from the petitioner. Humphreys did not testify at trial. The petitioner denied having sold or transferred any cocaine to Humphreys. J.C. Pulley and the petitioner testified that Humphreys had

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[4]At trial, neither the little boy nor the unnamed state police officer testified and the government made no showing that these individuals were unavailable. The report which Obermiller filed on the day of the search did not mention the little boy's statement.

[5]The plastic bags containing the cocaine found upstairs were different than the plastic bag of cocaine found in Humphreys' truck and from any of the other bags received from the government informant. The bags were different sizes. The cocaine found upstairs in the house was of a different strength than either the cocaine found in Humphreys truck or any of the cocaine purchased by the informant from Holleman.

borrowed money from the petitioner and that Humphreys repaid him $1,500 on December 9, 1988.

Prior to closing arguments, petitioner's defense counsel made a motion in limine to prevent the prosecutor from using the alleged statement by the little boy for the truth of the matter asserted. The prosecutor agreed not to argue the boy's statement as substantive evidence of the petitioner's guilt.

In his closing argument the prosecutor argued that Obermiller "overheard a 9 year old boy, the son of J. C. Pulley, say just before lunch Bobby [Pulley] had gotten a phone call and went to the back of the house and came back with a package and took it over to the [car] lot." [TR. 1156.] There was no testimony in the record that the petitioner ever went upstairs in the house or returned with a package.

Obermiller's testimony regarding the little boy's statement was the only evidence in the record that petitioner had ever gone to the back of the house on December 9, 1988.

REASONS FOR GRANTING THE WRIT

I. It was Reversible Error for the Trial Court to Admit Hearsay Testimony about an Alleged Statement made by a Young Boy which Linked the Petitioner to Cocaine in Violation of His Sixth Amendment Right to Confront the Witnesses Against Him. This Error was Compounded when the Prosecutor was Allowed to Embellish Upon the Agent's Hearsay Statement in his Closing Argument and to Argue Facts Not in Evidence.

In holding that Agent Obermiller's "scene-setting" testimony did not constitute hearsay and that this testimony was not improperly admitted at trial, the Sixth Circuit Court of Appeals ignored petitioner's right to confront the witnesses against him and the substantial evidence of

record that the prosecutor used this evidence substantively to link the petitioner to the cocaine in the house. The issue this Court is urged to act upon is an important one and one that requires the attention of the Court.

This Court has not considered the issue of admissibility of background investigative testimony. Several circuit courts have discussed the issue of whether background investigative testimony is hearsay or otherwise inadmissible evidence. Some courts have held that such testimony constitutes hearsay[6] while other courts have admitted such testimony on the basis that the police officer's testimony is offered for only a limited purpose of demonstrating why the government initiated its investigation of an accused or continued to investigate a suspect.[7] The circuit courts which have allowed the admission of such testimony have not adequately explained why such "scene-setting" testimony is necessary or even helpful to jurors in a criminal trial. Such evidence comes at a high price to the accused especially where the evidence points directly to the guilt of the accused naming him and linking him to the crime. No court has adequately explained why it is necessary to identify the accused by name and associate crime activity with him in considering the admissibility of background investigative testimony.

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[6]*Harris* v. *Wainwright*, 760 F.2d 1148, 1152-53 (11th Cir. 1985); *United States* v. *Gomez*, 529 F.2d 412, 416-17 (5th Cir. 1976); *United States* v. *Hernandez*, 750 F.2d 1256, 1257-59 (5th Cir. 1985); *United States* v. *LeMere*, 22 M.J. 61 (C.M.A. 1986); *United States* v. *Rodriguez*, 524 F.2d 485, 486-87 (5th Cir. 1975), cert. denied, 424 U.S. 975 (1976).

[7]*United States* v. *Martin*, 897 F.2d 1368 (6th Cir. 1990); *United States* v. *Freeman*, 816 F.2d 558, 563 (10th Cir. 1987); *United States* v. *Love*, 767 F.2d 1052, 1063-64 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986).

Petitioner respectfully asserts that this Court should act upon the issue presented since there is a variance in the circuit courts in analyzing this important evidentiary question. Due process and the protection of an accused's confrontation rights upholds every citizen's constitutional right to a fair trial and the right to cross-examine the witnesses against him. In this case it was quite unnecessary to identify the petitioner by name and to allow Agent Obermiller to repeat the contents of the alleged statement by a young boy which directly linked the sale of cocaine to the petitioner. Rather, any value gained by the admission of such hearsay evidence could have been satisfied by limiting Agent Obermiller's testimony to an assertion that he continued to search based upon information received which made him think there might be cocaine in the house. The prejudicial effect of allowing Agent Obermiller to introduce the hearsay statement of the young boy was outweighed by any probative value of the evidence.

The trial court allowed Agent Obermiller to testify over defense objection about an alleged conversation he overheard between a state police officer and an unnamed little boy in the foyer of the house. The prosecutor claimed that he was not offering the evidence for the truth of the matter asserted. Defense counsel objected to the evidence on the basis that the testimony was hearsay, that the witness could not be cross-examined on this statement because he was not the speaker, and that Agent Obermiller could not even identify the speaker.[8] The trial court overruled defense counsel's objection without stating the basis of its ruling.

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[8]Agent Obermiller stated that he believed the little boy was the nephew of the petitioner, but that he was not exactly sure who the little boy was.

Special Agent Obermiller then testified that he:

> heard the little boy state that they were eating their lunch and that there was a phone call that Bobby Pulley received, after which he said Bobby had gone into the back area of the house, he couldn't see where he went, it was in the back of the house, but that he came out a short time later and went out to the office, and that he came back into the house and sat down to eat.

[Obermiller at TR. 389-92.]

The impact of this evidence was compounded when the prosecutor argued in his closing argument that Agent Obermiller "overheard a 9 year old boy, the son of J.C. Pulley, say just before lunch Bobby had gotten a phone call, went to the back of the house *and came back with a package* and took it over to the lot." [TR. 1156.] (Emphasis added.) There was no testimony of record that the petitioner ever went upstairs to the back of the house or that he ever returned from the back of the house with a package.

In affirming the petitioner's conviction, the Sixth Circuit Court of Appeals correctly determined that whether Agent Obermiller's testimony about the boy's statement constituted hearsay is a question of law and that this issue is reviewable by an appellate court de novo. Federal Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The Sixth Court recognized that if Agent Obermiller's testimony about the boy's statement was offered to prove the truth of the boy's account of the telephone call and the petitioner's movements, the testimony was hearsay. If Agent Obermiller's testimony was offered solely to prove that he had good reason to continue his search, then the testimony was not hearsay.

The Sixth Circuit separated their consideration of the prosecutor's closing argument from their analysis of Obermiller's testimony about the boy's statement and characterized the prosecutor's misstated argument as "a comment on the slip." The Court of Appeals found that the testimony was not hearsay[9] and refused to disturb the trial court's finding that the prosecutor had offered this evidence solely to show why Obermiller continued to search the house. The Court of Appeals determined that the prosecutor's misstatement in his closing argument did not deprive the petitioner of a fair trial so as to justify a reversal of the conviction. The court concluded that the little boy could have been called to testify for the defense, placing the burden of rebutting this suspect testimony on the petitioner.

The Sixth Circuit's ruling failed to adequately address the confrontation clause issue and petitioner was deprived of his right to confront the witness against him. *Ohio* v. *Roberts,* 448 U.S. 56, 63-64 (1980).[10] The trial court and the Sixth Circuit ignored the clear evidence in the record that the prosecutor used this evidence substantively to show the petitioner's guilt as evidenced by his closing argument.

The admission of this evidence substantially prejudiced the petitioner because it linked him directly to the cocaine.

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[9]This evidence clearly does not fall within the state of mind exception under Federal Rule of Evidence 803(3) or the Hillmon doctrine as initially enunciated in *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892). The state of mind exception to the hearsay rule and the Hillmon doctrine only apply to statements of intent by a declarant to prove one's future conduct and not to a situation where the declarant is not the one whose conduct is at issue. Notes of Committee on the Judiciary House Report No. 93-650, Note to Paragraph 3, FRE 803(3).

[10]The confrontation clause envisions a personal examination and cross-examination of the witness.

The trial court compounded the error by overruling defense counsel's motion in limine to not allow the prosecutor to use this evidence substantively in his closing argument. The trial court allowed the prosecutor to magnify the error in his closing when he argued that the petitioner went to the back of the house, returned with a package of cocaine, and took it over to the car lot.

In *United States* v. *Rodriguez,* 524 F.2d 485, 486-88 (5th Cir. 1975), cert. denied, 424 U.S. 972 (1976), the Fifth Circuit Court of Appeals held as inadmissible hearsay an agent's testimony that the marijuana involved belonged to the accused. The court focused on the prejudicial nature of such evidence and the inability of a jury to disregard the probative nature of the testimony as hearsay despite the trial court's cautionary instruction to disregard the statements for the truth of the assertions. The court held that:

> The nature of the testimony was such that even this pre-admission warning was probably insufficient to remove the statements from the realm of hearsay. No instruction, regardless of its specificity or timeliness, could have precluded the jury from considering the informant's statements [repeated by the agent] as some evidence that the evidence was . . . the owner of the seized marijuana.

In this case the trial court did not even give a cautionary instruction and the prejudicial effect of the evidence was overwhelming, drawing the connecting link between the petitioner, the cocaine found in the house and the cocaine found in Humphreys' truck. The evidence was sufficiently damaging to warrant a reversal and the Sixth Circuit's separation of the analysis of these two matters shows the

court's blind consideration of the inherently prejudicial effect of this evidence.[11]

This case is similar to the facts in *United States* v. *Hernandez*, 750 F.2d 1256, 1256-60 (5th Cir. 1985), where the Fifth Circuit determined that the prosecutor's solicitation of inadmissible "scene-setting" hearsay testimony from a drug enforcement agent that the accused had been identified as a drug smuggler was reversible error. The Fifth Circuit found such evidence to be prejudicial, especially where the prosecutor, in closing argument, had emphasized and embellished such testimony. According to the opinion, the prosecutor offered this "scene-setting" testimony through an agent for the alleged purpose of explaining the motivation behind the investigation. The Fifth Circuit Court of Appeals held that the agent's testimony was not offered merely for this purpose. Rather, the court found that from a common sense perspective and from the government's subsequent use of the testimony, the evidence was offered to prove the truth of the matter asserted that the accused was a drug smuggler.

This Court is urged to review and reject the Sixth Circuit's conclusion that the testimony of Agent Obermiller was not hearsay. Agent Obermiller's testimony repeating the young boy's alleged statement directly identified the petitioner by name and connected the appellant with the cocaine in the house and the cocaine found in Humphreys' truck. The jury naturally considered the statements made by the officer for purposes in addition to merely under-

[11]The cocaine discovered in the upstairs bedroom was within access of several persons and the jury had to speculate to convict the petitioner on this count. The young boy's statement as related by Agent Obermiller and the prosecutor's statement on this evidence were the crucial evidence in connecting petitioner to the cocaine in the house.

standing why the investigation was continued. The evidence was inadmissible hearsay and the jury was unable to hear it selectively. The prosecution did not call the little boy to testify about this matter. The prosecution also failed to call the state police officer to whom the young boy allegedly made the statement. Petitioner was thereby denied his right to confront the witnesses against him.[12]

A review of the record also shows that the probative value of this evidence was substantially outweighed by its prejudicial effect. It is therefore respectfully submitted that the substantial prejudice suffered by petitioner is a result of the denial of his Fifth Amendment and Sixth Amendment rights and such denial warrants the granting of a writ of certiorari by this Honorable Court.

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[12]The Sixth Circuit's reasoning that the defense should have called the little boy to testify is untenable and is in direct conflict with the presumption of innocence and the burden of proof in all criminal cases.

CONCLUSION

Based upon the facts of this case and the foregoing argument and authorities, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-5211

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

BOBBY D. PULLEY, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed January 10, 1991

BEFORE: NELSON and NORRIS, Circuit Judges, and HIGGINS, District Judge*

DAVID A. NELSON, Circuit Judge. This in an appeal from a criminal conviction and sentence in a drug case. Perhaps the most significant of the several issues presented involves Rule 615, Fed. R. Evid., which governs the exclusion of witnesses from the courtroom so they cannot hear the testimony of other witnesses.

Subject to three exceptions, Rule 615 requires the trial court to order a separation of witnesses upon request.

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*The Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

Here, notwithstanding such a request, the court allowed two government agents, both of whom were on the witness list, to remain in the courtroom throughout the trial. The court relied on the rule's second exception, which allows "an" officer or employee of a governmental or corporate party to remain as the party's designated representative.

The rule, as we read it, allows the designation of only one agent. But although a technical violation of the rule occurred, we conclude, under the circumstances of this case, that the error was harmless. Accordingly, and because we find no other prejudicial error in the record, we shall affirm the judgment.

I

During the latter part of 1988, as the evidence showed, a government informant in Bowling Green, Kentucky, made a series of cocaine purchases. In the course of several of these transactions one of the sellers repaired to a used car lot where defendant Bobby Douglas Pulley maintained an office. The government suspected that the sellers were getting their drugs from Mr. Pulley.

On December 9, 1988, members of a joint federal-state drug task force gave the informant $1,600 in marked bills and told him to make another purchase. The informant contacted his usual source, whereupon the latter's associate (one Johnny Humphreys) went to the used car lot and saw defendant Pulley in his office. When the meeting broke up, Messrs. Pulley and Humphreys were both arrested.

Mr. Humphreys was found to have an ounce of cocaine in his possession, and defendant Pulley had more than $3,000 in his pants pocket. Of this sum, $1,500 consisted of marked bills with which the informant had been supplied that morning.

With help from other officers, a federal agent named Price searched defendant Pulley's office. No cocaine was

found there. (The officers did, however, find a loaded revolver and two boxes of plastic "baggies" similar to those in which cocaine previously bought by the informant had been packaged.) Steve Trosper, a Kentucky State Police Detective, helped search the downstairs of a residence adjoining the used car lot. That search disclosed more cash (the combined total reached almost $18,000) and more baggies, but no cocaine.

A third officer, United States Customs Agent Donald Obermiller, eventually searched an upper floor of the residence. Although a dog trained to detect drugs had previously been led through the upstairs without result, Agent Obermiller, while going through one of the upstairs bedrooms, found a supply of plastic bags containing 132 ounces of cocaine.

Pulley, Humphreys and Humphreys' associate were indicted on various cocaine and firearms charges. A mistrial was declared during the first trial, after which Pulley and Humphreys, but not the third defendant, were tried again on a superseding indictment.

As he had done at the first trial, defense counsel moved at the outset for a separation of witnesses. The district court ordered the separation, but granted a request by the prosecution that Agent Price and Detective Trosper both be permitted to remain at the trial table even though both were scheduled to be witnesses. The prosecution made no attempt to show that the concurrent presence of both men was essential to the presentation of its case.

Agent Price was the first witness called by the prosecution, and Detective Trosper was the second. (The nature of their testimony, and of certain other trial evidence, will be discussed hereafter). The jury acquitted Defendant Pulley on some charges, but found him guilty on two counts of aiding and abetting the possession of cocaine with in-

tent to distribute it, one count of possession with intent to distribute, and one count of conspiracy.

The United States Sentencing Guidelines called for a sentence of imprisonment in the range of 63-78 months. Finding an upward departure appropriate, the district court imposed a ten-year sentence (120 months), along with a $100,000 fine. This appeal followed.

II

Rule 615, Fed. R. Evid., provides as follows:

"Exclusion of Witnesses

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause."

The rule says that the court "shall" order a separation of witnesses upon request, and the notes of the Advisory Committee confirm that this means what it says; a requesting party is entitled to an order of separation "of right."

It is undisputed that under subpart (2) of the second sentence of Rule 615, at least one investigating agent may be designated to remain in the courtroom as the government's representative notwithstanding that the agent will be a prosecution witness. See *United States* v. *Parodi*, 703 F.2d 768, 773-74 (4th Cir. 1983), and the cases there cited. The parties disagree as to whether the rule entitles the government to designate more than one agent-witness to rep-

resent it. The issue has not heretofore been decided by our court.

The district judge concluded that subpart (2) gives a trial court discretion to let the government be represented by two agent-witnesses. *United States* v. *Alvarado,* 647 F.2d 537 (5th Cir. 1981), which was cited by the district judge, appears to support this view. *United States* v. *Farnham,* 791 F.2d 331 (4th Cir. 1986), on the other hand, rejects it. So does *United States* v. *Kosko,* 870 F.2d 162 (4th Cir.), *cert. denied,* 109 S.Ct. 3197 (1989), which reaffirms *Farnham.*

We agree with the conclusion announced by the United States Court of Appeals for the Fourth Circuit in *Farnham* and *Kosko.* "Relying on the mandatory language of Rule 615 and the singular phrasing of the exception embodied in 615(2)," the *Farnham* court said, "we hold that the district court erred in refusing to sequester [the second agent], if not during the entire trial, at least during the testimony of his colleague." *Farnham,* 791 F.2d at 335.

The Fourth Circuit's reading of the rule is supported by the notes of the Advisory Committee, which contain this sentence: "As the equivalent of the right of *a* natural-person party to be present, a party which is not a natural person is entitled to have *a* representative present." (Emphasis supplied.) "Most of the cases," the note continues, "have involved allowing *a* police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness." (Emphasis supplied.)

"A" representative, like "a" natural person, "a" police officer, and "an" officer or employee, is singular. Our court has been known to treat the plural as the functional equivalent of the singular, see *Minority Employees of the Tennessee Dept. of Employment Sec., Inc.* v. *State of Tennessee Dept. of Employment Sec.,* 901 F.2d 1327, 1342 (6th Cir.) (en banc) (Nelson, J., dissenting), *cert. denied,* 111

S.Ct. 210 (1990), but in the instant case we can discern no reason to convert the singular into the plural.

Where the government wants to have two agent-witnesses in attendance throughout the trial, it is always free to designate one agent as its representative under subpart (2) and try to show under subpart (3) that the presence of the second agent is "essential" to the presentation of its case. No such attempt was made here, and we doubt that the government would have been able to demonstrate that it was essential to have both agents in court together.

But we are not at the end of our inquiry. There is no strict requirement that the defendant prove prejudice in a situation such as this, but we nevertheless remain bound by the harmless error rule. *Farnham*, 791 F.2d at 335. We think the error committed by the district court in this case was harmless.

Agent Price, it will be remembered, was the very first witness to take the stand. He could not possibly have tailored his testimony to conform to the testimony of earlier witnesses, see *Geders* v. *United States*, 425 U.S. 80, 87 (1976), because there were no earlier witnesses. Detective Trosper, who testified second, might theoretically have tailored his testimony to fit Price's, but that possibility would have existed anyway if the prosecution had simply designated Trosper as its sole representative. Had it done so, Agent Price would still have testified first, Detective Trosper would still have heard every word that Price said, and Price would doubtless have been permitted to remain in the courtroom following the completion of his own testimony unless there had been some reason to suppose he might be recalled. We should be reluctant to put the taxpayers to the expense of another trial merely because the prosecution happened to designate a superfluous "representative."

The testimony of Agent Price and Detective Trosper did not overlap significantly, moreover "and therefore their mutual presence during trial could not have undermined the integrity of the fact-finding process." *Kosko,* 870 F.2d at 164. (Both men did testify to the discovery of the marked bills in defendant Pulley's pocket, but Mr. Pulley never denied that he had the bills; his story was that he received them in payment of a legitimate debt. Price and Trosper both testified as well about the search of Pulley's office and the consent given by Mr. Pulley and his mother to a search of the house, but here again there was absolutely no dispute about the facts.) Neither witness dwelt at length on matters on which the other testified. Price talked primarily about the events that led up to the arrest and about what was found in the search of the office; the search of the residence, Price explained, was conducted primarily by Detective Trosper, Agent Obermiller, and an agent from the Internal Revenue Service. Detective Trosper, for his part, testified about the general methodology of the search and the custody and testing of the drugs after their discovery in the upstairs bedroom by Agent Obermiller. The testimony of Price and Trosper did not concern completely different facts, but the overlap was inconsequential. The risk of any significant harm was virtually non-existent.

III

We turn next to an alleged hearsay problem in the testimony of Customs Agent Obermiller, the man who found the drugs in the upstairs bedroom.

Because it took some three hours to discover the drugs, and because the discovery occurred in a place where a trained "drug dog" had not detected anything, the prosecution thought it important for the jury to understand why the search was continued as long as it was. Such an explan-

ation could reasonably be considered a significant step in allaying any concern that the police might have planted the drugs themselves, as the defense suggested they did.

After Agent Obermiller had described the search of the downstairs and explained that no unauthorized personnel could have gone upstairs while the search was in progress, he testified that there were two incidents which made him suspect that not everything had been found. The first such incident — the only one that concerns us here — involved a disclosure made in Officer Obermiller's hearing by a little boy of the household.

After an objection on hearsay grounds, the prosecutor explained at a bench conference that the testimony about the boy's disclosure was being offered not as proof that the matter asserted was true, but to show one of the reasons the agent suspected that something more remained to be found in the house. The objection was overruled, and the agent then testified to having heard the boy say that there had been a phone call for defendant Pulley while the family was eating lunch that day; after receiving the call, defendant Pulley had gone first to the back area of the house, where the boy could not see him, and then to the office of the car lot; and that defendant Pulley had then returned to the table and resumed his lunch.

The trial judge was not asked to caution the jury that this testimony should not be considered as evidence that the events which Agent Obermiller heard described by the boy had actually occurred. The court did not choose to give such a cautionary instruction on its own motion.

Prior to closing arguments, defense counsel moved *in limine* that the prosecutor not be allowed to make susbtantive use of Agent Obermiller's testimony about the boy's statement. The prosecutor replied that he had "no intention of using it substantively." When asked if he planned to mention it at all, the prosecutor said that he did; he

was "[g]oing to mention it [as one of] the reasons Mr. Obermiller decided he needed to search the upstairs." Defense counsel argued that any reference to the testimony would serve a substantive purpose as well, but the court denied the motion. Again, there was no request for a limiting instruction to the jury.

In the course of his final argument, the prosecutor argued at some length that Agent Obermiller — whose regular assignment was in Florida, where he worked on international drug cases — had no reason to try to frame a used car dealer in Bowling Green, Kentucky. There had been good reasons for Agent Obermiller not to abandon his search, the prosecutor argued, one of which was this: "he also overheard a 9 year old boy, the son of J.C. Pulley, say just before lunch [that] Bobby [Pulley] had gotten a phone call and went to the back of the house and came back with a package and took it over to the lot."

This sentence — the only one in the prosecutor's argument that mentioned the boy's statement — contained at least one factual inaccuracy. Agent Obermiller did not, in his trial testimony, say that the boy mentioned a package. There was no objection to this misstatement, however, and although defense counsel alluded to the boy's disclosure in his own closing argument, he did not point out the prosecutor's error. (Defense counsel also noted that the boy was in the courtroom and could have been called as a witness by the defense. "I didn't call him as a witness, I won't do that. That's not necessary," defense counsel told the jury.)

Whether Agent Obermiller's testimony about the boy's statement constituted hearsay is a question of law. A trial court's conclusions on such questions are reviewed here *de novo*. *United States* v. *Levy*, 904 F.2d 1026, 1029 (6th Cir. 1990).

Rule 801(c), Fed. R. Evid., provides the following definition: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If Agent Obermiller's testimony about the boy's statement was offered to prove the truth of the boy's account of the telephone call and defendant Pulley's subsequent movements, the testimony was hearsay. If it was offered to prove that Agent Obermiller had good reason to continue his search of the house, it was not hearsay. And if it was offered for both purposes, it was hearsay in one aspect and not in the other.

The question of the prosecutor's purpose is essentially a question of fact, and we have no basis for rejecting the factual finding implicit in the trial court's decision to allow the testimony here. But there is another question that must be addressed. See *United States* v. *Martin*, 897 F.2d 1368 (6th Cir. 1990), where, although we concluded that "scene-setting" testimony not unlike that at issue in this case did not constitute hearsay, its admissibility had to be analyzed under Rule 403, Fed. R. Evid.:

> "When inculpatory out of court assertions name the criminal defendant in connection with 'setting the scene' for an investigation, the question of unfair prejudice under Rule 403 of the Federal Rules of Evidence almost always arises. That Rule states in relevant part that 'evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .' Rule 403, Fed. R. Evid.
>
> The relevance and probative value of 'investigative background' is often low, but the potential for abuse is high. In this case, there was no issue of improper investigative methods. The naming of appellant substantially increased the risk the jury would consider

> the unnamed other person's information in determining the guilt or innocence of appellant on the trafficking counts. The danger was compounded when the prosecutor repeated the appellant's name in briefly summarizing [the] testimony." *Id.* at 1372 (citations omitted).

Although there was no issue of improper investigative methods in *Martin,* there clearly was such an issue in the case at bar. The testimony about the boy's statement therefore had a higher probative value than it otherwise would have had. Mindful of the fact that the boy could easily have been called to testify for the defense, we conclude that the value of the testimony about what Agent Obermiller heard the boy say was not substantially outweighed by any danger of unfair prejudice or confusion.

The prosecutor's misstatement during final argument was unfortunate, but it was not incumbent on the trial judge to volunteer a comment on the slip. After reading the argument in its entirety, we are satisfied that the fleeting reference to what Agent Obermiller was supposed to have heard the boy say did not deprive defendant Pulley of a fair trial and would not justify a reversal of the conviction.

IV

The only remaining issue that we shall discuss in detail concerns the decision of the district court to depart from the guidelines by imposing a sentence of imprisonment 42 months longer than the maximum sentence within the range prescribed by the guidelines.

In determining the guideline range the court increasd the base offense level by two levels, as authorized by U.S.S.G. §3C1.1, on the basis of a finding that the defendant willfully obstructed justice by lying during his testimony at trial. See *United States* v. *Acosta-Cazares,* 878

F.2d 945, 953 (6th Cir.), *cert. denied,* 110 S.Ct. 255 (1989), which sanctions an increase under such a circumstance. In addition, the court granted a government request for an upward departure pursuant to U.S.S.G. §5K2.7. "If the defendant's conduct resulted in a significant disruption of a governmental function," that section of the guidelines states, "the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected."

The government argued that defendant Pulley had caused a significant "disruption" of a governmental function by persuading his co-defendant, Mr. Humphreys, to walk away from a confession that he had been obtaining drugs from Pulley for months, and by persuading members of the Pulley family to perjure themselves. A nephew of defendant Pulley gave testimony suggesting that government agents had planted drugs found in Humphreys' possession, and the government asserted that this testimony was the *quid pro quo* for Humphreys' agreement not to take the stand and subject himself to cross-examination about the earlier confession.

The district judge accepted the government's argument, stating that after sitting through the trial for two weeks he "would have to be from another planet not to think there was some collusion involved. . . ." Declaring that Mr. Pulley had woven "a web of deceipt," the court stated that Pulley drew both Humphreys and members of the Pulley family into his web. In some respects, the court found, testimony given by members of the family was not credible.

Under 18 U.S.C. §3553(b), a sentencing court must impose a sentence within the guideline range unless it finds "an aggravating or mitigating circumstance" that ought to result in a different sentence, and further finds this circumstance to be "of a kind, or to a degree, not adequately

taken into consideration by the Sentencing Commission in formulating the guidelines. . . ." Citing *United States* v. *Uca*, 867 F.2d 783 (3rd Cir. 1989), which involved neither perjury nor collusion resulting in disruption of a governmental function, Pulley argues that behavior such as his was adequately taken into consideration by the sentencing commission when it formulated U.S.S.G. §3C1.1 The district court having increased the offense level under that section on the basis of Mr. Pulley's allegedly false testimony, the argument continues, an upward departure from a range that already reflects that increase is not permissible.

The argument is faulty, we believe. In the first place, it ignores the statement in U.S.S.G. §5K2.0 that "the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." In the second place, the argument ignores the fact that the district court did not grant the departure on the basis of Pulley's own perjury. The court granted the departure, rather, because it was satisfied that Pulley had induced others to give false testimony and had colluded with Humphreys to prevent the use of the confession in which Humphreys had named Pulley as his supplier. These circumstances were in no way involved in the calculation of the guideline range.

We must accept the district court's factual findings unless they are clearly erroneous, and we must give due deference to the district court's application of the guidelines to the facts. *United States* v. *Christoph*, 904 F.2d 1036, 1039 (6th Cir. 1990). We do not believe that the factual findings in this case are clearly erroneous — and

given the facts as found by the district court, we do not believe that the departure was unlawful or unreasonable.

Mr. Pulley's other assignments of error relate to the sufficiency of the evidence with respect to one count of the indictment and to testimony about the defendant's failure to give a statement following his arrest. Our examination of the record has not persuaded us that Mr. Pulley is entitled to a reversal on either grounds.

AFFIRMED.

APPENDIX B

No. 90-5211

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

BOBBY DOUGLAS PULLEY, - - *Defendant-Appellant.*

ORDER—Filed March 25, 1991

BEFORE: NELSON and NORRIS, Circuit Judges; and HIGGINS*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of the court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court

(s) Leonard Green
Leonard Green, Clerk

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*Hon. Thomas A. Higgins sitting by designation from the Middle District of Tennessee

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 90-5211

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

BOBBY DOUGLAS PULLEY - - *Defendant-Appellant*

Before: Nelson, and Norris, Circuit Judges;
Higgins, District Judge

JUDGMENT—Filed January 10, 1991

ON APPEAL from the United States District Court for the Western District of Kentucky at Bowling Green.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

Entered By Order Of The Court

(s) Leonard Green
Leonard Green, Clerk

A True Copy.

Attest:

(s) Cheryl Borkowski
Deputy Clerk
(Mrs.) Cheryl Borkowski

Issued as Mandate 4/3/91